

ESTTA Tracking number: **ESTTA561886**

Filing date: **09/27/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205076
Party	Defendant Rafael Robert Vargas
Correspondence Address	JON JEKIELEK JEKIELEK & JANIS LLP 153 WEST 27TH STREET, SUITE 204 NEW YORK, NY 10001 UNITED STATES jon@jj-lawyers.com
Submission	Motion to Reopen
Filer's Name	Jon D. Jekielek, Esq.
Filer's e-mail	jon@jj-lawyers.com
Signature	/Jon D. Jekielek/
Date	09/27/2013
Attachments	NOM_Fulanito.pdf(61943 bytes) AFFIRMATION_JDJ & Exhibits.pdf(405326 bytes) AFFIDAVIT_Vargas.pdf(172942 bytes) MOL_Fulanito.pdf(423856 bytes) CERT.of.SERVICE.pdf(46404 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
WINSTON ROSA,

Plaintiff,

-against-

Opposition No.: 91205706

Serial No.: 85480930

Mark: FULANITO

Filed: November 25, 2011

Published: May 8, 2012

RAFAEL ROBERT VARGAS,

Defendant

NOTICE OF MOTION

-----X

PLEASE TAKE NOTICE that upon the annexed affirmation of Jon D. Jekielek, averred to on the 27th day of September 2013, the exhibits annexed thereto, the Affidavit of Rafael Robert Vargas (the "Defendant") and the Memorandum of Law, all of which are made in support of defendant, Defendant's Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Fed. R. Civ. P. 6(b)(1)(B) and to Strike the Testimony of Mr. Caba Rosa from the Record (the "Motion"), before the Trademark Trial and Appeal Board (the "TTAB"), at a date to be determined by the TTAB, for an Order granting Defendant's Motion by setting new deadlines for (1) the parties to conduct and complete formal discovery in this matter; (2) the parties to file Pre-Trial Disclosures with the TTAB; (3) the parties 30-Day Trial Period; and (4) striking from the record the recorded testimony of Mr. Caba Rosa.

PLEASE TAKE FURTHER NOTICE, that pursuant to 37 CFR Section 2.119(c), any brief or papers in response to this Motion must be filed by you within twenty days from the date of service of this Motion.

Dated: New York, New York
September 27, 2013

JEKIELEK & JANIS, LLP

By: 

Jon D. Jekielek, Esq.
153 West 27th Street, Ste. 204
New York, New York 10001
Tel: (212) 686-7008
Fax: (646) 657-3265
Jon@jj-lawyers.com

Attorneys for Defendant

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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WINSTON ROSA,

Plaintiff,

-against-

RAFAEL ROBERT VARGAS.,

Defendant
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Opposition No.: 91205706

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Mark: FULANITO

Filed: November 25, 2011

Published: May 8, 2012

**AFFIRMATION OF
JON D. JEKIELEK, ESQ.**

JON D. JEKIELEK an attorney duly admitted before this Court, hereby affirms the following under penalties of perjury:

1. I am the attorney for defendant Rafael Robert Vargas ("Vargas" or "Defendant") and, in this regard, have personal knowledge of the facts and circumstances contained in this affirmation.

2. I respectfully submit this affirmation in support of Defendant's Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Rule 6(b) of the Federal Rules of Civil Procedure (the "Motion") and to Strike the Recorded Testimony of Caba Rosa from the Record.

3. On or about August 29, 2013 I was retained by the Rafael Robert Vargas, the defendant in connection with the above captioned matter and in connection with the dispute over the ownership of the trademark FULANITPO, serial number 85480930 (the "Mark") which Defendant had applied for registration with the United States Patent and Trademark Office on March 6, 2013. A true and accurate copy of the status of the Mark as provided for in the Trademark Electronic Search System ("TESS") is annexed hereto as Exhibit A.

4. Up until this time, Mr. Vargas had been representing himself Pro Se in this matter.

5. Upon being retained I promptly filed a Notice of Appearance and a Change of Correspondence Address through the Electronic System for Trademark Trials and Appeals. See Exhibit B, Documents 18 and 19. A true and accurate copy of the Prosecution History in this matter as printed from the Trademark Trial and Appeal Board Inquiry System is annexed hereto as Exhibit B.

6. I also reviewed the Prosecution History in this matter, all documents filed with the Trademark Trial and Appeal Board and discussed in detail with Mr. Vargas what discovery had been conducted by and between the Parties.

7. Pursuant to the Discovery Conference Order issued by the TTAB on August 27, 2012, Discovery opened on October 27, 2012 and was set to close on April 25, 2013. See Ex A, Document 8. The Plaintiff's Pre-Trial Disclosures were due on June 9, 2013 and his 30-day Trial Period was scheduled to end on July 24, 2013. See Exhibit A, Document 8. The Defendant's Pre-Trial Disclosures were due on August 8, 2013 and his 30-day Trial Period ends on September 22, 2013. See Exhibit A, Document 8 (the aforementioned time periods are collectively referred to as the "Discovery Period").

8. Mr. Vargas confirmed what was clear from the Prosecution History, that aside from the filing of the Opposition by the Plaintiff and the Answer by the Defendant, the parties had not served Initial Disclosures, did not engage in any formal or informal discovery, had not filed any Pre-Trial Evidence or any documents in connection with their respective 30 Day Trial Periods.

9. In fact the only discovery conducted by either party occurred on June 10, 2013 the Plaintiff provided notice that he was going to provide formal testimony related to this matter and filed such recorded testimony of Caba Rosa, his father, with the TTAB on July 31, 2013. See Exhibit A, Document 17.

10. This recorded testimony should be stricken from the record because it was (a) filed outside of the applicable discovery period as set forth by the Discovery Order issued by the TTAB on August 27, 2013 (See Exhibit A, Document 8); (b) it was taken and filed after both the Plaintiff's Pre-Trial Disclosures were due, June 9, 2013 and after the Plaintiff's 30-day Trial Period was scheduled to end, July 24, 2013 (See Exhibit A, Document 8); (c) and as expressly stated in the TTAB's August 27, 2012 Discovery Conference Order, "discovery may not be served until the party seeking discovery has served its initial disclosures".

11. Due to the Plaintiff's failure to take and file the testimony of Caba Rosa pursuant as provided for above, the TTAB should not consider and/or strike Caba Rosa's recorded testimony from the record, with leave to re-file the testimony if the TTAB reopens the Discovery Period and the Plaintiff first serves its Initial Disclosures.

12. I have discussed with Mr. Vargas in detail the reasons that he did not conduct any discovery, or file any document/evidence during the Discovery Period and within the time provided pursuant to the TAB's August 27, 2013 Scheduling Order. The Defendant informed me that he did not conduct any discovery in this matter during the Discovery period because he was confused about the discovery process. Mr. Vargas was not sure as to whether he was required to submit the documents relevant to his ownership of the Mark and which were in his possession directly to the Plaintiff or TTAB unprompted, or wait until the Plaintiff or TTAB requested these documents from him.

13. Furthermore, Mr. Vargas was unsure of the manner he was allowed to request discovery from the Plaintiff and ultimately did not understand the rules of procedure utilized by the TTAB and which governed this dispute.

14. Since this action commenced before the TTAB, Mr. Vargas consulted with two attorneys regarding possible representation in this matter, however he could not afford to retain counsel to represent him and he was not provided any guidance or direction with respect to how to proceed with discovery or otherwise.

15. Mr. Vargas makes very little income in connection with his career in the entertainment and music industry, or otherwise and it was a great economic hardship for him to be able to retain counsel. I reduced my legal fees so Mr. Vargas could retain my firm, which he was able to do in or around August 29, 2013.

16. After I was retained and after I reviewed the Prosecution History and was informed by Mr. Vargas that the parties had not conducted any discovery in this matter, it was determined that the Defendant should request that the Discovery Period be reopened so that both parties would be afforded the opportunity to properly conduct discovery and set forth the basis to the TTAB for their claim of ownership in and to the Mark.

17. Prior to seeking this relief from the TTABV, I first attempted to reach the Plaintiff and obtain his consent to reopen his Discovery Period. To that effect, I sent an electronic mail to the Plaintiff at the address on file with the TTAB, whereby I introduced myself as the Defendant's attorney and I asked the Plaintiff if he would consent to reopening the Discovery Period so that both parties could conduct discovery, exchange documents and identify and take the testimony of any potential witnesses. To date the Plaintiff has not responded to my attempts to reach him and therefore, the Plaintiff has not consented to the request by Mr. Vargas to reopen the Discovery Period. However, the Plaintiff has not denied the Defendant's request to reopen the Discovery Period. To date I have not heard from the Plaintiff.

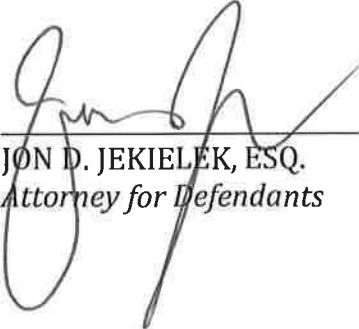
18. As it stands now, due to the parties failure to conduct any form of discovery of file evidence in admissible form, the TTAB will not be able to adjudicate this matter on the merits, as there is not sufficient evidence and facts before the board to render a fully informed decision as to which party is the lawful owner of the Mark.

19. The Defendant's request is made in good faith and if granted will not prejudice the Plaintiff in any way, and it will not affect the judicial proceedings in this matter, other than delaying the TTAB's final adjudication of this matter, which is actually a good thing seeing how there is no admissible evidence on record.

20. On behalf of the Defendants, I submit that when all of the factors surrounding this request are taken into consideration, the TTAB should find that the Defendant has made a case that excusable neglect exists and that the Discovery Period should be reopened and both the Plaintiff and the Defendant allowed to move forward with the taking of, and exchange of discovery.

Based on the foregoing, I respectfully request the Court to grant Defendant's Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Rule 6(b) of the Federal Rules of Civil Procedure and to Strike the Plaintiff's Testimony from the Record as inadmissible.

Dated: New York, New York
September 27, 2013



JON D. JEKIELEK, ESQ.
Attorney for Defendants

EXHIBIT A



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TSDR	ASSIGN Status	TTAB Status
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(Use the "Back" button of the Internet Browser to return to TESS)
Word Mark FULANITO**Translations** The English translation of "FULANITO" in the mark is "THE GUY".

Goods and Services IC 041. US 100 101 107. G & S: Arranging and conducting of concerts; Audio recording and production; Concert booking; Entertainment in the nature of live stage performances in the nature of concerts in the field of music by an individual; Entertainment services by a musical artist and producer, namely, musical composition for others and production of musical sound recordings; Entertainment services in the nature of live musical performances; Entertainment services in the nature of presenting live musical performances; Entertainment services in the nature of recording, production and post-production services in the field of music; Entertainment services in the nature of music performances; Entertainment services, namely, dance events by a recording artist; Entertainment, namely, live music concerts; Entertainment, namely, live performances by a musical band; Live performances by a musical group; Provision of information relating to live performances, road shows, live stage events, theatrical performances, live music concerts and audience participation in such events. FIRST USE: 19971120. FIRST USE IN COMMERCE: 19971120

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design 26.17.01 - Bands, straight; Bars, straight; Lines, straight; Straight line(s), band(s) or bar(s)**Search Code** 26.17.05 - Bands, horizontal; Bars, horizontal; Horizontal line(s), band(s) or bar(s); Lines, horizontal**Serial Number** 85480930**Filing Date** November 25, 2011**Current Basis** 1A

Original Filing Basis 1A
Published for Opposition May 8, 2012
Owner (APPLICANT) Rafael Robert Vargas INDIVIDUAL UNITED STATES 4965 Sw 165th Ave Miramar FLORIDA 33027
Description of Mark The color(s) gold is/are claimed as a feature of the mark. The mark consists of the color gold appearing in the text of the wording "FULANITO", and in the two parallel lines beneath the wording "FULANITO".
Type of Mark SERVICE MARK
Register PRINCIPAL
Live/Dead Indicator LIVE

TESS HOME	NEW USER	STRUCTURED	FREE FORM	BROWSE DOC	SEARCH OG	TOP	HELP	PREV LIST	CURR LIST
NEXT LIST	FIRST DOC	PREV DOC	NEXT DOC	LAST DOC					

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EXHIBIT B

**United States Patent and Trademark Office**[Home](#) | [Site Index](#) | [Search](#) | [Guides](#) | [Contacts](#) | [eBusiness](#) | [eBiz alerts](#) | [News](#) | [Help](#)**TTABVUE. Trademark Trial and Appeal Board Inquiry System****v1.5****Opposition****Number:** 91205076**Filing Date:** 05/08/2012**Status:** Pending**Status Date:** 05/08/2012**Interlocutory Attorney:** ELIZABETH WINTER**Defendant****Name:** Rafael Robert Vargas**Correspondence:** JON JEKIELEKJEKIELEK & JANIS LLP
153 WEST 27TH STREET, SUITE 204
NEW YORK, NY 10001
UNITED STATES
jon@jj-lawyers.com**Serial #:** 85480930Application File**Application Status:** Opposition Pending**Mark:** FULANITO**Plaintiff****Name:** Mr. Winston A. Rosa**Correspondence:** MR WINSTON A ROSA2190 BOSTON ROAD, APT 3 J
BRONX, NY 10462
UNITED STATES
fulanito@fulanitoreal.com**Prosecution History**

#	Date	History Text	Due Date
19	08/29/2013	<u>D APPEARANCE / POWER OF ATTORNEY</u>	
18	08/29/2013	<u>CHANGE OF CORRESP ADDRESS</u>	
17	07/31/2013	<u>P TESTIMONY</u>	
16	08/01/2013	<u>P PROOF OS SERVICE</u>	
15	07/30/2013	<u>P NOTICE OF TAKING TESTIMONY</u>	
14	06/10/2013	<u>P NOTICE OF TAKING TESTIMONY</u>	
13	03/19/2013	<u>TRIAL DATES REMAIN AS SET</u>	
12	10/25/2012	<u>ANSWER</u>	
11	10/25/2012	<u>ANSWER</u>	
10	09/25/2012	<u>P'S MOTION TO AMEND PLEADING/AMENDED PLEADING</u>	
9	08/28/2012	<u>CORRECTION TO BOARD`S ORDER</u>	
8	08/27/2012	<u>DISCOVERY CONFERENCE ORDER; AMENDED NOTICE OF OPPOSITION DUE; SUSPENDED; TRIAL DATES RESET</u>	
7	07/31/2012	<u>D REQUEST FOR DISCOVERY CONFERENCE-ESTTA</u>	
6	07/05/2012	<u>DEF'S PROOF OF CERTIFICATE OF SERVICE</u>	
5	06/27/2012	<u>RESPONSE DUE 30 DAYS (DUE DATE)</u>	07/27/2012
4	06/18/2012	<u>ANSWER</u>	

Prosecution History

#	Date	History Text	Due Date
3	05/09/2012	PENDING, INSTITUTED	
2	05/09/2012	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	06/18/2012
1	05/08/2012	<u>FILED AND FEE</u>	

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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
WINSTON ROSA,

Plaintiff,

-against-

RAFAEL ROBERT VARGAS.,

Defendant
-----X

Opposition No.: 91205706

Serial No.: 85480930

Mark: FULANITO

Filed: November 25, 2011

Published: May 8, 2012

**AFFIDAVIT OF RAFAEL
ROBERT VARGAS**

RAFAEL ROBERT VARGAS, being duly sworn, deposes and says the following under penalties of perjury:

1. I am the Owner of the mark FULANITO, Serial No.: 85480930 (the "Mark") and the individual defendant ("Defendant" or "I") in the above-captioned action and have personal knowledge of the facts and circumstances contained in this affidavit.

2. I respectfully submit this affidavit in support of Plaintiff's Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Rule 6(b) of the Federal Rules of Civil Procedure (the "Motion") and to Strike the Plaintiff's Testimony from the Record.

3. Since the inception of this proceeding before the Trademark Trial and Appeal Board (the "TTAB") the parties to this action have been self-represented and have proceeded without counsel.

4. On May 8, 2012, the plaintiff Winston Rosa ("Plaintiff" or "Rosa") commenced this action by filing the above-captioned opposition to the publication and registration of the Mark.

5. On June 18, 2012, I filed Plaintiff's Answer to the Defendant's Opposition.

6. Due to deficiencies in the Answer, I was directed to re-file the Answer with corrections.

On October 25, 2012, I re-filed the Answer with corrections.

7. TTAB Interlocutory Attorney, Elizabeth J. Winter issued a Discovery Conference Order and Notice of Trial Dates Reset ("Discovery Order") on August 27, 2012 and mailed it to the parties.

8. The Discovery Order stated that "discovery may not be served until the party seeking discovery has served its initial disclosures."

9. Neither party served its Initial Disclosures during the applicable discovery period and has not to date.

10. The only discovery conducted by either party was when Mr. Rosa provided notice that he will be taking the formal testimony of Caba Rosa, the Plaintiff's father, which filed with the TTAB on July 31, 2013.

11. On August 29, 2013, I retained counsel Jon D. Jekielek, Esq. of Jekielek & Janis, LLP to represent me in this matter.

12. Mr. Jekielek explained that the Discovery Order set forth the applicable schedule for parties to conduct their discovery as well as set a Pretrial Disclosure Schedule and Trial Periods for each party. It also set the discovery to open on October 27, 2012 and to close on April 25, 2013 (the "Discovery Period.")

13. Mr. Jekielek also explained that because neither party ever served Initial Disclosures, which he believes the testimony of Caba Rosa was not properly submitted and is not admissible.

14. I never received any Initial disclosures from the Plaintiff where Caba Rosa was identified as a party with knowledge of the facts pertaining to this matter.

15. In addition to neither party serving Initial Disclosures or conducting any discovery during the Discovery Period, neither party filed or served any Pre Trial Disclosures with the TTAB and did not file any documents or evidence during their respective trial periods.

16. I did not conduct any discovery in this matter during the Discovery Period because I was confused about the discovery process and was not sure how to proceed. I did not know whether to submit the relevant documents in my possession to the Plaintiff or the TTAB unprompted or wait until the Plaintiff or TTAB requested these documents.

17. I also was not sure as to how request discovery from the Plaintiff and I did not understand the rules of procedure applied by the TTAB and which governed this dispute.

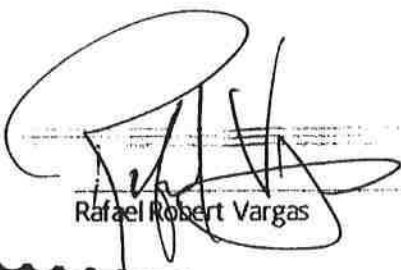
18. I consulted with two attorneys regarding representation in this matter, however I could not afford retain counsel to represent me and they did not provide me any advice as how to proceed or handle this matter.

19. My career in the entertainment and music industry has produced very little income and at that time, it would have been a great economic hardship for me to retain counsel. It remains difficult for me to pay my attorney now.


20. Now that I have retained counsel, I fully understand what I need to do in regards to conducting discovery in this matter and if reopened will move forward expeditiously in order to resolve this matter in a timely fashion.

21. As it has been explained to me neither party has conducted any discovery properly as of this date, both parties are similarly situated. Therefore, it is my good faith belief that the Plaintiff will suffer any prejudice if discovery is reopened.

Based on the foregoing, I respectfully request the Court to grant Defendant's Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Rule 6(b) of the Federal Rules of Civil Procedure (the "Motion") and to Strike the Plaintiffs Testimony from the Record pursuant to Rule ____ of the Federal Rules of Civil Procedure.


Rafael Robert Vargas

Sworn before me this 25
day of September 2013


NOTARY PUBLIC



Jon D. Jekielek, Esq.
Jekielek & Janis, LLP
153 West 27th Street, Ste. 204
New York, New York 10001
Tel: (212) 686-7008
Fax: (646) 657-3265
Jon@jj-lawyers.com
Attorneys for Defendant

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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WINSTON ROSA,

Plaintiff,

-against-

Opposition No.: 91205706
Serial No.: 85480930
Mark: FULANITO
Filed: November 25, 2011
Published: May 8, 2012

RAFAEL ROBERT VARGAS.,

Defendant

-----X

Defendant Rafael Robert Vargas, (“Vargas” or “Defendant”) respectfully submits this memorandum of law in support of its Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Rule 6(b) of the Federal Rules of Civil Procedure (the “Motion”) and to Strike the Plaintiff’s Testimony from the Record pursuant to Rule 6(b) of the Federal Rules of Civil Procedure

STATEMENT OF FACTS

For its Statement of Facts, Plaintiff respectfully refers the Court to the Prosecution History (a copy of the Prosecution History is annexed to the Affirmation of Jon D. Jekielek as Exhibit A) of this matter and all pleadings, documents and exhibits included therein, the

Affidavit of Rafael Vargas (the “Vargas Aff.”) and the Affirmation of Jon D. Jekielek, Esq. (the “Jekielek Aff.”) and all Exhibits annexed thereto.

This case is related to the word mark “FULANITO (the “Mark”) and is a dispute between the Plaintiff and the Defendant as to who is the rightful owner of the Mark. See Vargas Aff. at Para. #1.

Since the inception of this proceeding before the Trademark Trial and Appeal Board (the “TTAB”) the parties to this action have been self-represented and have proceeded without counsel. On May 8, 2012, the Plaintiff instituted this action by filing an Opposition to the publication and registration of trademark serial number 85480930 which Defendant had applied for registration with the United States Patent and Trademark Office on March 6, 2013. See Vargas Aff. at Para. #3 and Jekielek Aff. at Ex. A. The Defendant initially filed its Answer to the Defendant’s Opposition on June 18, 2012. See Vargas Aff. at Para. #5 and Jekielek Aff. at Ex. A. Due to deficiencies in the Answer, the Defendant was directed to re-file the Answer with certain corrections.

The Defendant refilled its Answer on October 25, 2013. See Vargas Aff. at 6 and Jekielek Aff. at Ex. A. From October 25, 2013 through June 10, 2013, despite the Discovery Conference Order and Notice of Trial Dates Reset (the “Discovery Order”) which was filed and mailed to all parties by TTAB Interlocutory Attorney, Elizabeth J. Winter, which expressly states that “discovery may not be served until the party seeking discovery has served its initial disclosures”, neither party served its Initial Disclosures during the applicable discovery period and has not to date. In fact the only discovery conducted by either party occurred on June 10, 2013 the Plaintiff provided notice that he was going to provide formal testimony related to this matter and filed such recorded testimony of Caba Rosa, his father, with the TTAB on July 31,

2013. See Vargas Aff. at Para. #10 and Jekielek Aff. at Ex. A. On August 29, 2013, Defendant retained counsel, Jon D. Jekielek, Esq. of Jekielek & Janis, LLP. See Jekielek Aff. at Para. #3.

The Discovery Order set forth the applicable scheduled for the parties to conduct their discovery as well as set a Pretrial Disclosure Schedule and Trial Periods for each party. See Jekielek Aff. Ex A, Document 8. Discovery opened on October 27, 2012 and was set to close on April 25, 2103 (the "Discovery Period"). See Jekielek Aff. Ex A, Document 8. The Plaintiff's Pre-Trial Disclosures were due on June 9, 2013 and his 30-day Trial Period was scheduled to end on July 24, 2013. See Jekielek Aff. Ex A, Document 8. The Defendant's Pre-Trial Disclosures were due on August 8, 2013 and his 30-day Trial Period ends on September 22, 2013. See Jekielek Aff. Ex A, Document 8.

In addition to neither party serving Initial Disclosures or conducting any discovery during the Discovery Period, neither party filed or served any Pre Trial Disclosures with the TTAB and did not file any documents or evidence during their respective trial periods. See Vargas Aff. at Para. #15. The testimony that Plaintiff did file, was done after close of the Discovery Period, and after both its Pretrial Disclosers were due and his 30 day Trial Period Ended. See Jekielek Aff. Ex. A.

The Defendant did not conduct any discovery in this matter during the Discovery period because he was confused about the discovery process. See Vargas Aff. at Para. #16. Vargas was not sure as to whether he was to submit the relevant documents in his possession to the Plaintiff or TTAB unprompted, or wait until the Plaintiff or TTAB requested these documents from him. See Vargas Aff. at Para. #16. Furthermore, Vargas was unsure of how he could request discovery from the Plaintiff and ultimately did not understand the rules of procedure applied by the TTAB and which governed this dispute. See Vargas Aff. at Para. #17. Mr. Vargas did consult with two

attorneys regarding representation in this matter, however he could not afford to retain counsel to represent him. See Vargas Aff. at Para. #18. Mr. Vargas makes very little income in connection with his career in the entertainment and music industry and it was a great economic hardship for him to be able to retain counsel. See Vargas Aff. at Para. #19. Mr. Vargas, was finally able to retain counsel, realizing that the dates as set forth in the Discovery Order continue to pass. See Vargas Aff Para. #12.

Upon being retained, counsel for Vargas attempted to contact the Plaintiff to request his consent to reopen and discovery and to reopen and/or adjourn the other dates in the Discovery Order that have since passed. See Jekielek Aff. at Para. #17. To date the Plaintiff has not consented to this request, nor has the Defendant denied the Defendant's request. See Jekielek Aff. at Para. #17.

ARGUMENT

I. THE TTAB SHOULD REOPEN THE DISCOVERY SCHEDULE, THE PRE-TRIAL DISCLOSURE PERIODS AND THE 30 DAY TRIAL PERIODS FOR EACH PARTY IN THIS MATTER

The TTAB should reopen the time for the parties to conduct discovery and by which to file pre-trial and trial materials (collectively referred to herein as the "Discovery Period") in this matter. Where the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. The movant must show that its failure to act during the time previously allotted therefor was the result of excusable neglect. See Fed. R. Civ. P. 6(b)(1)(B); *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

In determining whether or not a party has shown excusable neglect the court considers the following factors,(1) the danger of prejudice to the non-moving party, (2) the length of the delay that will be incurred as a result of re-opening the deadlines and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party acted in good faith. [*Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

(A) The Plaintiff Will Suffer No Prejudice Should the Discovery Period be Reopened.

The Plaintiff will not be prejudiced by the reopening of the deadlines in this matter to conduct discovery and otherwise. The “prejudice to the nonmoving” contemplated under the first *Pioneer* factor must be more than the mere inconvenience and delay caused by the movant’s previous failure to take timely action, and more than the non-movant’s loss of any tactical advantage which it otherwise would enjoy as a result of the movant’s delay or omission. *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Rather, “prejudice to the nonmovant” is prejudice to the nonmovant’s ability to litigate the case, e.g., where the movant’s delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant. *Id.*

Here, the parties are similarly situated in that neither party has conducted any discovery in admissible form. It is not as if the Defendant sat idly by as the Plaintiff spent time and money putting its case together. The only discovery taken by the Plaintiff was the submission of recorded testimony taken from Caba Rosa, the Plaintiff’s father. As the Defendant never served initial disclosures, or otherwise identified Caba Rosa as a party who had knowledge of the facts

of this dispute, and the Defendant took and filed this testimony outside of the Discovery Period, and it's time to submit Pre-Trial Disclosures and its 30 Day Trial Period, this testimony is not admissible. Furthermore, the witness that the Defendant is relying on is his father and seems to be readily available as this testimony was taken recently, on July 9, 2013.

Therefore, based on the record, there is not any legal prejudice to the Plaintiff that would prevent it from presenting its case or cause it to bear greater costs in going forward on its claims than had it conducted discovery as provided for in the original TTAB order. *See Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir.. 1997); *Paolo Assocaitees Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990).

Therefore, the Plaintiff will not be prejudiced by the TTAB granting this motion.

(B) The Length of the Delay Caused By Reopening the Deadlines Will Not Negatively Impact the Judicial Proceedings

Due to the parties collective failure to conduct discovery and otherwise file any documents with the TTAB in support of their respective positions, other than the initial filings, reopening the Discovery Period will not negatively impact the judicial proceedings. As the case stands today, neither party proceeded with their case. In fact, based on the current procedural posture and lack of evidence and facts presented by either party, it appears that a trier of fact would have a difficult time ruling on this matter. Reopening the Discovery Period would afford the parties the opportunity to properly conduct discovery, present their respective cases and allow the TTAB to make a decision based on the facts and the merits rather than the initial filings.

Additionally, to date the TTAB has not had to oversee any disputes between the parties, rule on any motions, nor has an order been issued since August 27, 2012, over a year. See

Jekielek Aff, Ex. A. As a result, very limited judicial resources have been utilized in connection with this matter. Based on the foregoing, the Defendant submits that reopening the Discovery Period will not negatively impact the judicial proceedings.

(C) The Defendant did not Fully Understand the Discovery Process and its Obligations

Defendant's failure to conduct discovery and file documents with the TTAB during the time frames required are excusable and were due to outside factors. A movant seeking to reopen deadlines which have already passed must show that the reason for the delay, was not in the reasonable control of the moving party.. [*Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). A party's *pro se* status may be considered as one factor in determining whether excusable neglect has been demonstrated, *Alston v. Pafumi*, No.3:09CV1978(CSH), 2012 WL 6093893, 2 (D. Conn. 2012).

In the instant matter, the defendant, Mr., Vargas could not afford to retain an attorney to represent him in this matter until recently. Therefore, monetary restraints and financial imitates beyond the control of Mr. Vargas required him to move forward without counsel. Mr. Vargas admits that he did not fully understand the rules of civil procedure as they applied to conducting and taking discovery in this matter, and as they apply to the submission of Pre-Trial evidence and trial. As evidenced by the record, this was not a tactical decision as in the case of the applicant in, *Luster Products Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 (TTAB 2012), Mr. Vargas truly was did not understand how discovery before the TTAB works, and apparently neither does the Plaintiff.

In order for this case to be decided on the merits and for the TTAB to be able to render a decision based on the facts and establish the true owner of the Fulanito mark, there must be some discovery between the parties.

Therefore, the applicant respectfully requests that the TTAB consider the facts that Mr. Vargas was (1) representing himself Pro Se; (2) was subjected to financial restraints and conditions beyond his control that prevented him from retaining an attorney and (3) did not fully understand the rules of civil procedure. All of these factors played a role in Mr. Vargas neglect to conduct discovery and file pre-trial and trial materials and the applicant requests that the TTAB reopen the Discovery Period as a result thereof.

(D) The Movant Has Acted in Good Faith

The Defendant has acted in good faith throughout these judicial proceedings and has brought this application to reopen the Discovery Period in good faith. The fourth factor the Court considers is whether or not the movant has acted in good faith. *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). There is no gamesmanship here, and it is clear from the record as well as the Defendant's testimony as provided in its affirmation that Defendant did not participate in discovery because he did not understand the discovery process. See Vargas Aff. at Para. #17. Furthermore, the Defendant did not fail to respond to discovery requests, impede discovery or frustrate the discovery process. See Vargas Aff. at Para. #13, 14, 15. Nor did the Defendant employ any strategy in not conducting discovery. See *Luster Products Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 (TTAB 2012) (applicant made a calculated strategic decision, within its control, not to take discovery in the hope opposer had lost interest in the case, even though the parties held settlement discussions and opposer requested an extension of the discovery period before it closed).

Based on the foregoing, it is without dispute that the Defendant makes this application to reopen the Discovery Period in good faith and request is made for the TTAB to reopen the Discovery period, affording the parties a reasonable period of time to conduct discovery and move forward with this matter.

CONCLUSION

Based on the foregoing facts and law, the Court should find that its collective analysis of the factors surrounding the Defendants failure to conduct discovery and otherwise submit evidence and trial materials was the result of excusable neglect and the TTAB should reopen the Discovery Period.

Dated: New York, NY
September 27, 2013

Respectfully submitted,

JEKIELEK & JANIS, LLP

By: 
Jon D. Jekielek, Esq.
153 West 27th Street, Ste. 204
New York, New York 10001
Tel: (212) 686-7008
Fax: (646) 657-3265
Jon@jj-lawyers.com

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
WINSTON ROSA,

Plaintiff,

-against-

Opposition No.: 91205706

Serial No.: 85480930

Mark: FULANITO

Filed: November 25, 2011

Published: May 8, 2012

RAFAEL ROBERT VARGAS,

Defendant.
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CERTIFICATE OF SERVICE

On September 27, 2013, I served a true copy of the annexed Notice of Motion to Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period, the Affidavit of Rafael Robert Vargas, the Affirmation of Jon D. Jekielek, Esq., and all exhibits annexed thereto, by sending them via electronic mail and by mailing the same via first class certified mail, with postage prepaid thereon, and depositing it with an authorized United States Post Office box within the State of New York addressed to the Plaintiff as indicated: Mr. Winston Rosa, 2190 Boston Road, Apartment 3-J, Bronx, NY 10462.

Dated: New York, New York
September 27, 2013

JEKIELEK & JANIS, LLP

By: 

Jon D. Jekielek, Esq.

153 West 27th Street, Ste. 204

New York, New York 10001

Tel: (212) 686-7008

Fax: (646) 657-3265

Jon@jj-lawyers.com

Attorneys for Rafael Robert Vargas